

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by Fredric J. Gross

77-6147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

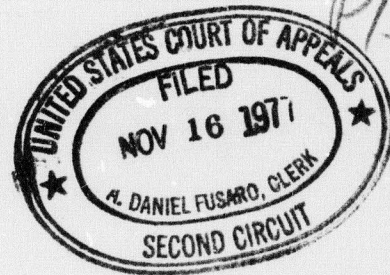
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ALFRED A. CURCI,

Appellant,

- against -

THE UNITED STATES OF AMERICA, THE
JUDGE ADVOCATE GENERAL OF THE
ARMY, and THE SECRETARY OF THE
ARMY,

Appellees.
----- x



ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
NEW YORK SUMMARILY DISMISSING THE COMPLAINT
IN DOCKET NO. 76 C 794 (Mishler, C.J.)

BRIEF FOR APPELLANT

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POINT ONE

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QUESTIONS PRESENTED FOR REVIEW

1. Is not appellant's court-martial conviction constitutionally invalid where the non-lawyer assigned to defend him recognized neither the inability of the prosecution to make its case nor the availability to appellant of duress as a complete defense, and where the military did not give full and fair consideration to that affirmative defense?
2. Where relief under Article 69 of the Uniform Code of Military Justice is sought on grounds that substantial prejudicial error tainted appellant's trial by court-martial, is the Judge Advocate General not required to evaluate the facts of record in compliance with settled principles of military law; and will not mandamus lie where the Judge Advocate General arbitrarily and capriciously refuses to do so?

STATUTE INVOLVED

10 U.S.C. § 869 was amended by 82 Stat. 1342 to provide, in pertinent part, that:

"the findings or sentence [of appellant's court-martial] may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."

STATEMENT OF THE CASE

Alfred A. Curci appeals from an order of the United States District Court for the Eastern District of New York (per Mishler, C.J.), summarily dismissing an action seeking to compel the Judge Advocate General of the Army to reprocess an Article 69 appeal from a conviction by general court-martial, or alternatively to expunge the record of that conviction. Appellant was convicted of desertion by a 1948 Army general court-martial. The court-martial awarded the maximum sentence permitted by law. Thereafter, the convening authority approved only a finding of guilt to the charge of AWOL, and adjusted the sentence to reflect the maximum permitted for this lesser offense: six months of confinement at hard labor, total forfeitures, and dishonorable discharge. Under the Articles of War then in effect, appellant had no right to appeal from the conviction or sentence.

After serving his sentence, appellant repeatedly invoked the jurisdiction of the Army Board for Correction of Military Records to expunge his record of conviction. That Board never advised him that as a matter of policy it would not examine a record of conviction for legal errors. It merely denied relief. On appellant's third application, the Board did suggest that he invoke the newly-enacted provisions of Article 69, U.C.M.J. (10 U.S.C. § 869), as amended by the Military Justice Act of 1968.

Appellant thereafter perfected an Article 69 appeal. His primary contention was that the appointed non-lawyer defense counsel had acted as an amicus curiae rather than an advocate. The

Article 69 application was denied without opinion. See App. 70a.¹

Curci then brought suit in the court below. He complained that the denial of relief under Article 69 had been accomplished in derogation of applicable standards; he sought to compel the Army to reprocess the Article 69 appeal in conformity with the statutory standards and the established body of military law and precedents. In the alternative, Curci sought relief from the underlying conviction on the grounds that (1) he was denied the effective assistance of counsel, (2) he was denied due process of law by the failure of the military to resolve an affirmative defense -- duress -- that had been raised by his testimony, and/or (3) his induction was void ab initio, in consequence of which the court-martial was without jurisdiction to try him. See Complaint, App. 2a.

Upon receipt of the Answer (App. 11a), appellant moved for summary judgment on all issues. All parties relied upon the official military records, copies of which were submitted to the district court. App. 24a - 68a. In an opinion dated July 29, 1977, the District Court held that the Article 69 proceedings were procedurally adequate and that appellant had not been denied the effective assistance of counsel. App. 13a-23a. The opinion did not address the military's failure to resolve the duress defense, nor the validity of appellant's induction.

In an order of even date, the complaint was dismissed. This appeal follows.

1. Appendix, page 70a. References to the Appendix are hereinafter cited as "App."

STATEMENT OF THE FACTS

Alfred A. Curci was inducted into the United States Army in October, 1945. Previously he had been found unsuitable for service. At the time of his induction, he informed examining personnel that he was afflicted with a painful disorder of the right testicle. App. 58a. This disorder, a hydrocele, should have precluded induction.

During the next 14 months, Curci frequently complained of pain in his testicle. Army medical personnel recommended surgery. Curci resisted that recommendation. Eventually, Curci was put, in Chief Judge Mishler's words, to a "Hobson's choice" (App. 21a): submit to surgery or face a court-martial for disobeying an order to do so. Not being especially enamored of either of the stated alternatives, Curci adopted a third alternative: he went AWOL.

Ten months later he voluntarily returned to Fort Dix. He was charged with desertion, and tried for that offense in early 1948 by a general court-martial. Assigned to act as his defense counsel was a non-lawyer infantry officer. App. 47a.

Trial commenced on February 19, 1948, at 10:45 A.M. The prosecution sought to make its proofs by introduction of two documents. The first, a morning report extract, purported to prove that on December 24, 1946, Curci went AWOL from his unit. The morning report was prepared on December 28, 1947, and therefore was not likely to memorialize personal knowledge by its author of Curci's alleged absence. This irregularity was noted before trial,

but was deemed insignificant. See App. 37a, at paragraph 8. The second document would establish the date of his return to military control.²

When the prosecution offered the first document, the following colloquy was had:

LAW MEMBER: It would appear from this morning report extract that the extract is in error. It purports to be an extract of the morning report of the 28th of December 1947 dropping the accused to absent without leave as of the 24th of December 1946.

PROSECUTION: Apparently it is in error, sir. I don't know off hand. May it please the Court, may I have just a minute's recess while I discuss this?

Thereupon the court recessed until 11:00 A.M. Upon coming to order, the Prosecution announced (App. 52a):

[I]t is hereby stipulated between the prosecution, the defense and the accused, Private Alfred A. Curci, that the accused went absent without leave from Company E, 43d Training Battalion, ground Force Replacement Center, Fort Dix, New Jersey on or about 24 December 1946.

The Law Member inquired of Curci whether the stipulation was freely entered, and whether he understood that in its absence, the prosecution would have to make its proofs. Curci responded affirmatively. Curci was not told that the stipulation fully satisfied the government's burden of proving absence without leave. See App. 52a-53a.

After the stipulation was accepted by the court-martial, the prosecution proved the date of Curci's voluntary return to

2. AWOL, an instantaneous offense, is complete at its inception. The duration of the absence must be proved, but is pertinent solely to sentencing. Hence the proof of return to military control is not sufficient to prove unauthorized absence. See note 8, infra.

Fort Dix and rested. App. 53a. The defense offered no objections and no motions.

After being informed of his rights, Curci chose to take the witness stand. Testifying under oath, Curci was asked on direct to explain the reason for his ten month absence. He responded (App. 55a):

Well, sir, ever since I came in the service, I have been pretty sick. I go to sick call quite often because of a bad testicle I have, and when I did go to sick call they told me I would have to have an operation performed on the right testicle. Upon hearing this, I got very nervous and I started to worry as soon as I heard this, and I kept going back to sick call asking the captain there if there was any other way I could have this taken care of without an operation and the captain told me that was the only way I could feel better if I had this operation performed, and I was told that if I did not get the operation, that I would be court-martialed. Upon hearing this and being very frightened about getting this operation and having them cut open my testicle and operate on me, I went AWOL, sir.

On cross examination, Curci affirmed that he went AWOL because he was afraid of the prospective operation. "If I didn't have the operation, I would get this court-martial, and I was very much worried by the success of the operation, and just what it would do to me." (App. 60a).

Curci's unrefuted testimony put in issue the affirmative defense of duress. Military law **incorporates** the common law view that a reasonable fear of imminent bodily harm constitutes a legal justification for any offense except murder. But Curci's defense counsel, and indeed all parties to the court-martial, apparently proceeded to judgment oblivious to the presence of a duress issue. Not once in the record of trial, the post-trial review, or any of the allied papers, is the word or concept of

duress mentioned, let alone discussed. It can fairly be stated that although raised, the issue of duress was never resolved by the court-martial.

Curci was convicted of desertion, and awarded the maximum permissible sentence. The trial was followed by a routine ex parte post-trial review. The Fort Dix staff judge advocate (mischaracterized in the opinion below as "The Judge Advocate General" App. 15a) wrote an "Advice." In it, he summarized the evidence and rulings, opined on their legal merit and recommended a particular disposition of the case.

The staff judge advocate offered the following opinion (App. 30a):

It will be observed * * * that the initial unauthorized absence of the accused was not proved by any evidence, documentary or otherwise, offered by the Prosecution. Such initial absence was established by the Prosecution by means of a stipulation * * *. The Court satisfied itself that the accused understood the stipulation, that he understood that he did not need to agree to it, and that he understood that if he did not agree to it, the Prosecution would have to make its proof by other means. By the accused's action, he "stipulated himself out of court," i.e., he established a prima facie case of absence without leave and supplied the proof thereof, which apparently was otherwise unavailable, to the Prosecution at that stage of the trial. In such circumstances it would have been the better practice for the Law Member to have enlarged upon the effect of the stipulation to the end that the accused would fully appreciate the legal scope of the stipulation.

The staff judge advocate opined that by thereafter waiving the privilege against self-incrimination, Curci rendered harmless his counsel's hasty decision to "stipulate himself out of court."³

3. "However, in view of the fact that during his own testimony, under oath, the accused judicially confessed his unauthorized absence, it may not be said that the stipulation was improvident or prejudicial." Id. Note, however, that Curci had no recollection of the unit to which he was assigned, although that unit was identified in the stipulation. App. 61a.

The Staff Judge Advocate further opined that the prosecution had not proved beyond all reasonable doubt that Curci intended to remain absent permanently. Hence desertion had not been proved. Accordingly, he recommended that the guilty finding be reduced to simple AWOL, and concomitantly, that the sentence be reduced so as not to exceed the maximum permitted for the lesser included offense. App. 32a. The Convening Authority adopted this recommendation, reducing the charge and approving the maximum sentence permitted for AWOL. App. 67a. Curci thereupon was required to serve six months in confinement at hard labor, to forfeit all pay and allowances, and to receive a dishonorable discharge after termination of the confinement.

Curci did not appeal from the findings and sentence as approved, because under the Articles of War no appeal was available. Curci did seek relief from the Army Board for Correction of Military Records,⁴ but to no avail. Applications to that Board were denied in 1953, 1963 and 1971. In rejecting the last application, the Board advised Curci that relief from the court-martial conviction might be available under Article 69 of the Uniform Code (10 U.S.C. § 869), as amended by the Military Justice Act of 1968, P.L. 90-632. App. 16a.

Curci thereafter applied for relief under Article 69. His application was denied without opinion. App. 70a. In a covering letter to counsel (App. 69a) an Army official declared:

Your main contention -- inadequacy of representation -- was analyzed and reviewed carefully. It was concluded, however, that the representation by the non-lawyer

4. See 10 U.S.C. § 1552.

defense counsel was not prejudicially inadequate. More than likely his agreement to stipulate the period of "AWOL" was based on the theory that an admissible morning report entry was obtainable by the prosecution. It is noted, of course, that the accused's trial testimony and the lack of the prosecution's evidence as to required intent caused the approval of only the lesser included offense of "AWOL."

No other explanation for the disposition of the Article 69 appeal is of record. No direct evidence is of record respecting the "theory" upon which the defense counsel acted. Circumstantial evidence of record strongly suggests that defense counsel perceived his role as that of an amicus, not an advocate. For example, he made no motions, exercised no challenges, pressed no objections, and preferred stipulations to the live testimony available to him.

Curci thereafter brought suit in the court below. He initially sought, as a matter of first impression, a judicial construction of Article 69 to the effect that the Army had proceeded in the erroneous view that the cited statute was a clemency mechanism, when Congress intended to provide a traditional appeal as of right from all otherwise unappealable court-martial convictions. During the pendency of this action, however, the highest military tribunal had occasion to construe Article 69 as Curci was urging. McPhail v. United States, 24 U.S.C.M.A. 304, 52 C.M.R. 15 (1976). Accordingly, the relief requested was modified so as to seek reconsideration by the Army in light of the intervening military decision. See plaintiff's post-argument brief in the court below.

Alternatively, Curci attacked the underlying judgment of the court-martial. Three of the bases for his attack have been preserved on this appeal: that the non-lawyer defense counsel

did not provide effective assistance within the meaning of the Due Process and Assistance of Counsel clauses; that Curci was denied Due Process of Law by the military's failure to resolve the duress defense; and that the court-martial lacked personal jurisdiction because under a recent line of military cases, Curci's induction was void ab initio.⁵

The district court, although not impressed by defendants' insistence that the complaint was time-barred, nonetheless summarily dismissed the complaint. In its opinion (App. 13a), it did not address the Army's failure to consider the duress defense at any stage of the proceedings, and it did not address the validity of Curci's induction. It did adopt the Article 69 reviewer's bald speculation that the prosecution had access to the evidence needed to convict, notwithstanding the staff judge advocate's contrary determination almost thirty years earlier. App.30a. Likewise, the district court adopted the Article 69 reviewer's unsupported assumption that there was an informed strategy underlying the tactics of the assigned non-lawyer defense counsel.

5. The challenge to the validity of the induction is premised upon the retrospective application of United States v. Burden, 23 U.S.C.M.A. 511, 50 C.M.R. 649 (1975) (irregularities in induction processing void induction ab initio); and upon proof that the examining physician took the law into his own hands by failing to disqualify Curci. Because the factual record has not been adequately developed, and the district court did not, in its opinion, address the validity of the induction, the issue is not ripe for appellate review. Accordingly, appellant has not briefed the question, but does request that in the absence of other relief, the case be remanded to the district court for a determination of the validity of his induction.

SUMMARY OF THE ARGUMENT

I

The Wight-Rickenbacker standard does not control when the defense was conducted by an assigned non-lawyer. The performance of counsel in any event was so woefully inept as to result in a farce and a mockery of justice. The failure of the military fully and fairly to consider the defense of duress denied Curci due process of law. Accordingly, the district court should have granted relief on Count Two of Curci's complaint, which attacked the validity of his court-martial conviction.

II

A landmark decision of the Court of Military Appeals, released four months after Curci's complaint was filed, held that Article 69 appeals must be resolved in conformity with the Court of Military Appeals' holdings in cases on point. Curci's Article 69 appeal was denied without opinion, notwithstanding an overwhelming collection of military precedents that conclusively established Curci's entitlement to relief. Thus the Article 69 disposition was arbitrary and capricious. The district court should have applied the law of the military on Count One of Curci's complaint, which sought mandamus compelling the Judge Advocate General to comply with the statutory command that Article 69 appeals be resolved in conformity with the principles that bind all military tribunals.

POINT ONE: Where an assigned non-lawyer counsel commits three major prejudicial errors -- stipulating unprovable elements of the prosecution's case, pointlessly waiving the self-incrimination privilege, and failing to recognize and argue that duress justified the misconduct alleged -- and the military does not fully and fairly consider a recognized defense, due process of law has been denied.

This is a case in which an accused, charged with the military equivalent of a felony, went to trial assisted solely by an assigned military officer, who was not an attorney. There is no evidence of record that defense counsel had ever received any formal legal training.⁶ Counsel made three egregious blunders, in the absence of any of which Curci almost certainly would have been vindicated of the charge.

First, the court-martial had ruled inadmissible the document upon which the government sought to establish the inception of an unauthorized absence from the accused's assigned unit. A five minute recess resulted in counsel's stipulation to the facts as pleaded.⁷ Absent that stipulation, an acquittal

6. The court below observed that counsel was "admitted to the military bar." App. 14a. True, but nugatory. In Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965), an accused was tried by court-martial for a capital offense, assisted solely by an assigned non-lawyer defense counsel. Gibbs' counsel was as much admitted to practice before courts-martial as was Curci's. Yet Gibbs' counsel "was not a lawyer, had never had any legal training and . . . had never been in a courtroom before the day of Gibbs' court-martial." Id. at 470. Quite simply, every officer, by virtue of his commission, was "admitted to the military bar."

7. App. 52a.

Although the district court "hypothesized about the reasons underlying the tactical decisions made," (App. 21a), its hypotheses,

was a virtual certainty.⁸ He "stipulated himself out of court." App. 30a.

Second, counsel prevailed upon Curci to waive his self-incrimination privilege and testify at the trial. Absent Curci's testimony, which was characterized in the staff judge advocate's formal opinion as "judicially confessing" to the charge (App. 30a),

(fn. 7, cont'd.)

which are utterly without record support, are also of doubtful validity. The suggestion that the stipulation was designed "to bar testimony concerning his prior unauthorized absences" (*id.*) is plainly fallacious. Uncharged misconduct which has not been the subject of an adverse adjudication is simply not admissible; if it were, Curci would have been cross-examined on those allegations when he testified. Nor can it be so lightly asserted that "surely there was other available evidence." *Id.* The excluded morning report was known to be irregular before the case went to trial. See App. 37a. If better evidence were available, the prosecution had both the opportunity and the duty to secure it before trial ever commenced. With the post-war reduction in forces, and with normal rotation of personnel, it seems more likely than not that fourteen months after the inception, personnel who could recall the event were not to be found at Fort Dix. Finally, the morning report extract which was admitted to prove termination of AWOL contained an admission by Curci of absence without leave from a unit other than the one charged at trial. Compare App. 68a with App. 34a. Accordingly, it was insufficient to prove the inception of the offense charged (assuming that it could be received as an admission against interest, when it was only offered as a record of return to military control).

At the very least, summary judgment is inappropriate on such speculative grounds, when the parties have received no opportunity to attempt to locate the court-martial personnel through discovery pursuant to the Federal Rules of Civil Procedure.

8. The stipulation alone proved AWOL. Curci was tried for desertion, which is an aggravated form of AWOL, in which the accused harbors an intent to remain away permanently. See Manual for Courts-Martial, U.S. Army (1928) para. 130a. AWOL has the following elements: the accused (1) at a time specified, (2) without lawful authority, (3) absented himself from his assigned station or place of duty. See *id.*, para. 132.

Notwithstanding the confrontation clause of the sixth amendment, AWOL is almost invariably proven by the mere introduction into evidence of morning report extracts. These documents are deemed self-authenticating, and as falling within the hearsay exception for documents made in the normal course of business. If there is an irregularity in the document, as there was in the morning report extract excluded at Curci's trial, then the cited hearsay exception

the staff judge advocate would have ruled the stipulation improvident, and thereupon recommended that the guilty verdict be disapproved. Staff judge advocate recommendations are routinely adopted by the convening authority -- as indeed happened in this case.

Third, Curci's testimony placed in issue the complete defense of duress.⁹ Counsel was obviously oblivious to the legal significance of Curci's depiction of the Hobson's choice he had to make. Had counsel argued duress, it is substantially likely that an acquittal would have resulted.¹⁰

(fn. 8, cont'd.)

no longer applies.

It is settled military law that the proofs contained in the morning report must conform to the charge as pleaded. Thus, in United States v. Aikens, 27 C.M.R. 543 (B.R. 558), a six year AWOL terminated by arrest resulted in an acquittal, because the inception morning report came from a unit other than that from which the prosecution pleaded the accused's unlawful absence. Usually the inception morning report is the beginning and the end of an AWOL trial. AWOL is complete at its inception, and duration goes only to the "gravity of the offense." United States v. Emerson, 1 U.S.C.M.A. 43, 46, 1 C.M.R. 43, 46 (1951).

9. Duress has long been recognized as a defense to AWOL charges. A. Avins, The Law of AWOL 147-48 (1957) (collecting historical authorities). Indeed, the defense is given such wide latitude that one who has suffered severe maltreatment from his superiors, or just from his military peers, is justified in fleeing his unit, even in the absence of imminent bodily harm. Id.

10. Because the substance of counsel's closing argument is not preserved in the trial minutes, there can be no certainty as to whether duress in fact was argued. However, it is noteworthy that not once is the concept of duress, let alone that word, to be found in any of the military records, including the record of the Article 39 proceeding. Counsel's general performance makes it much more likely than not that he did not appreciate the significance of the testimony adduced. Note that throughout the trial, counsel exercised no challenges, made no motions, offered no objections. Indeed, he sat by silently while the court sua sponte refused to receive the irregular morning report into evidence.

Notwithstanding this prejudicially inept representation, the district court eschewed a finding that Curci was denied the effective assistance of counsel or a meaningful Article 69 appeal. As shall be demonstrated below, the district court committed three errors en route to that result: it failed to appreciate the fundamental distinction between trained lawyers and untrained lay persons; it failed to appreciate the prejudice flowing from counsel's blunders; and it failed to appreciate that for purposes of reviewing the Article 69 proceedings, it was bound to apply the settled military law of effective assistance.

A. Powell and Gideon preclude application of the "farce, mockery" standard to this case because they recognize a fundamental distinction between lawyers and lay persons.

Relying solely upon an isolated and inapposite district court opinion,¹¹ the court below held applicable this Circuit's "farce, mockery" standard for effective assistance of counsel, as announced in United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950), and recently

(fn. 10, cont'd.)

Such inaction, when combined with the stipulation and the decision to waive the self-incrimination privilege, mandates the conclusion, which the court below accepted, that counsel did not identify or argue duress. App. 22a.

11. Williams v. Froehlke, 356 F. Supp. 591, 594 (S.D.N.Y. 1973), aff'd. on other grounds, 490 F.2d 998 (2d Cir. 1974). See App. 20a. Williams is clearly inapposite. True, Williams was not represented by a lawyer; rather, he was represented by two lawyers, one civilian, one military. The district court could find no prejudice in their tandem performance.

reaffirmed in Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976),
cert. denied, ___ U.S. ___ (Oct. 3, 1977). Conceding, as appellant
must, that for purposes of collateral review, the "farce, mockery"
standard for evaluating an attorney's performance applies, this
court has never suggested that in the absence of a Faretta
situation¹² a non-lawyer's efforts are to be reviewed in accordance
with Wight. Such a holding, appellant respectfully submits, is
precluded by the landmark decisions in Gideon v. Wainwright,
372 U.S. 35 (1963) and Powell v. Alabama, 287 U.S. 45 (1932).

Powell turned upon the distinctive ability that a trained
professional can be presumed to possess, and an untrained lay
person can be presumed to lack.

"Even the intelligent and educated layman has small
and sometimes no skill in the science of law. If
charged with crime, he is incapable, generally, of
determining for himself whether the indictment is
good or bad. He is unfamiliar with the rules of
evidence. Left without the aid of counsel he may
be put on trial without a proper charge, and convicted
upon incompetent evidence, or evidence irrelevant to
the issue or otherwise inadmissible. He lacks both
the skill and knowledge adequately to prepare his
defense, even though he have a perfect one. He
requires the guiding hand of counsel at every step
in the proceedings against him. Without it, though
he be not guilty, he faces the danger of conviction
because he does not know how to establish his
innocence." 287 U.S., at 68-69.

Clearly, Justice Sutherland, in using the term "counsel" in the
quoted text, was referring exclusively to professional attorneys.
Any doubts on that score are put to rest by Gideon. There,

12. Faretta v. California, 422 U.S. 806 (1975) (an accused has a
constitutional right to defend pro se, but will not thereafter
be heard to complain that he did so ineffectively).

immediately before reproducing the above excerpt from Powell, Justice Black wrote (emphasis added):

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama.

372 U.S. at 344.

Significantly, nothing in Gideon -- or in Betts v. Brady 316 U.S. 455 (1942), which it overruled -- suggests that the critical element of prejudice could be isolated from the efforts of the pro se petitioner. Of Gideon's efforts, the Supreme Court wrote:

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument emphasizing his innocence to the charge contained in the Information filed in this case.

372 U.S. at 337. In preparing the Gideon brief, an associate of Mr. Fortas recognized that at first blush, the trial transcript supported the proposition that Gideon did not need counsel. But a closer analysis -- along lines indistinguishable from those that Curci here presents -- left the firm conviction that an attorney of modest skill could have made ashes of the case. See A. Lewis, Gideon's Trumpet 62-63, 126 (1963). Similarly, appellant respectfully submits, no attorney deserving of a license would

have committed all three of the prejudicial mistakes that Curci's non-lawyer defender committed.

The quintessential significance of the lawyer-lay person distinction not only underlay the Gideon decision, it mandated full retrospective application. "In Gideon v. Wainwright, supra, we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and violations of previously declared rights adequately. Because of this, the judgment lacked reliability." Linkletter v. Walker, 381 U.S. 618, 139 n.14 (1965). Thousands of convictions were voided, and innumerable prisoners -- most, undoubtedly guilty in fact -- were freed, upon the per se rule of Gideon. A conviction for a serious crime, in the absence of an attorney's assistance, is inherently suspect.

Arguably, Gideon requires overruling those cases which hold that representation by non-lawyer military counsel is not per se unconstitutional.¹³ But in the present case, that question need not be reached. Curci, unlike Betts and Gideon, has demonstrated the existence of special circumstances that required a trained professional as defense counsel. The prosecution came to court with incompetent proofs; and the defense squandered a valid legal justification for the conduct alleged. The non-lawyer

13. See cases cited in the Opinion below. App. 13a-23a. See also, Homey v. Resor, 455 F.2d 1345, 1351 (D.C. Cir. 1971) (counsel had two years in law school, participated in more than 200 courts-martial, including as defense counsel in at least 50 trials; minor errors of counsel were alleged); Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967) (special court-martial, treated as misdemeanor, decided prior to Argersinger v. Hamlin, 407 U.S. 25 (1972); no claim of prejudice).

assigned to defend Curci lacked the skills necessary to deal with these special circumstances.¹⁴ Curci plainly suffered prejudice.

The foregoing authorities command the conclusion that a constitutional distinction between lawyer and non-lawyer must be recognized. Even before Gideon, if the absence of a qualified attorney at the accused's side was not clearly harmless, the conviction could not stand.

The district court committed reversible error in glossing over the fundamental distinction upon which Gideon was decided. Where, as here, an accused mounts a substantial claim that with a lawyer's assistance he would have been acquitted, he has demonstrated his entitlement to relief. Because Curci's assigned defender had not been trained in litigation strategy, the Wight-Rickenbacker standard -- which presumes that an attorney exercised informed judgment in conducting the defense -- is inapplicable.

14. Under the Betts "special circumstances" test, the Supreme Court repeatedly reversed for refusing to appoint counsel to defend charges of technical character. Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Williams v. Kaiser, 323 U.S. 471 (1945). Reversals were also ordered where there was the possibility of a technical defense. McNeal v. Culver, 365 U.S. 109 (1961); Rice v. Olson, 324 U.S. 786 (1945). Reversals were routine upon a showing that prejudice flowed from the strategy adopted by the pro se non-lawyer defendant. Carnley v. Cochran, 369 U.S. 506 (1962) (failure to follow advantageous procedure). In one of the last of the "special circumstances" cases, Chewning v. Cunningham, 368 U.S. 443 (1962), the Court looked to potential prejudice that might flow from absence of an imaginative lawyer, without intimating any opinion as to whether such problems were presented on the record, or if present, had probable merit. And see Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947), a pre-Curci decision finding denial of effective assistance although the acts charged at the court-martial were not in dispute.

B. Relief under the Wight-Rickenbacker standard should be forthcoming where, as here, the record compels the conclusion that counsel repeatedly threw to the winds substantial opportunities for acquittal.

Appellant accepts, as he must, that the constitutional standard for effective assistance of a lawyer is that announced in Wight, supra. Assuming arguendo that the same stringent standard applies to assigned non-lawyer defense counsel, it is respectfully submitted that appellant's constitutional protections have in fact been abridged. Counsel's efforts were farcical, and made a mockery of justice.

In the long line of this Circuit's cases collected by Judge Smith in his Rickenbacker opinion, 550 F.2d at 65, not one involved a counsel determined to snatch defeat from the jaws of victory. In none of those cases did counsel, upon receipt of a major favorable ruling, stipulate away its benefit. In none of those cases did counsel, having placed on the record the facts essential to a complete affirmative defense, fail to urge an acquittal rationally premised upon the record facts. None of those whose due process and effective assistance claims have foundered on this Circuit's "farce, mockery" standard could seriously contend, as Curci does, that his trial was reduced to a hollow formality.

The inescapable truth is that Curci would have been acquitted in the absence of the stipulation; Curci would probably have been acquitted had duress been competently argued. Compare

Palfy v. Caldwell, 448 F.2d 328 (6th Cir. 1971), where defendant's consent to stipulations and to his attorneys' strategy was held not to foreclose inquiry under the 'farce, mockery' standard. Curci surely would have been acquitted had an attorney of marginal competence conducted his defense.

Had Curci been required to conduct his own defense, would not he have made the same strategic decisions? And would not the district court thereupon have voided his conviction? Can it rationally be held that simply because the convening authority (himself a non-lawyer) saw fit to assign another non-lawyer as defense counsel, that Curci's constitutional rights were thereby salvaged? Is it not clear that beyond his mere physical presence, Curci's assigned defender added nothing to his cause, and threw away much?

In Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972), counsel's failure to question the reliability of identification testimony was held to be ineffective assistance, where conviction rested on that identification. Curci's counsel far outdid Saltys'. Curci's chose to stipulate after the damning evidence had been ruled inadmissible. Surely Curci's right to relief is *a fortiori* to Saltys'.

C. Although finding that duress was placed in issue, the District Court failed to determine whether the military gave full and fair consideration to that affirmative defense.

Alfred A. Curci, then 21 years old, was ordered to undergo elective surgery on his testicle or face trial by court-martial. The court below was eminently correct in finding that Curci had been put to a "Hobson's choice." App. 21a. By definition, one confronted with such terrifying alternatives acts under duress. The court below further found that duress had been placed in issue at Curci's subsequent court-martial: "recognizing merit in the reasons for Curci's actions, counsel elicited all of the facts concerning his dilemma on direct examination. That counsel did not argue duress by name is of little consequence." App. 22a. But the court below did not ascertain that the military judiciary gave the required full and fair consideration to the duress defense.

That Curci was entitled as a matter of right to such consideration at every stage of the proceedings is beyond dispute. The Court of Military Appeals has held that duress must be considered whenever "the record contains some evidence to which the military jury may attach credit if it so desires." United States v. Simmelkjaek, 18 USCMA 406, 40 CMR 118 (1969) (disobedience out of fear that accused was being sent to a lynching party). The required consideration is not dependent on counsel's requesting an instruction or specifically pleading duress; it is merely dependent upon the introduction of evidence which, if

credited, would sustain the defense. Id. See also United States v. Jemmings, 24 USCMA 251, 51 CMR 630 (1976) (duress defense available where fear was of harm to loved ones at an uncertain future time); A. Avins, The Law of AWOL 147-48 (1957).

Given, then, that duress was placed in issue at Curci's trial, the military record is utterly devoid of evidence that it was thereafter resolved. Nothing in the court-martial minutes suggests that the fact-finders entertained the question of duress. Nothing in the staff judge advocate's post-trial review¹⁵ suggests that he or the convening authority perceived duress as an issue. Nothing in the Article 69 disposition suggests that the Judge Advocate General gave consideration to the question of duress.

The total absence of indicia that the duress defense was fully and fairly considered establishes as a matter of law that such consideration was never had. Directly on point is United States v. Burston, 23 USCMA 478, 50 CMR 497 (1975). Burston raised the entrapment defense at trial. The staff judge advocate, in preparing his advice to the convening authority, omitted all

15. Because the convening authority has an independent duty to determine whether the findings and sentence are factually and legally correct as well as appropriate [United States v. Hill, 22 USCMA 419, 47 CMR 397 (1973); United States v. Owens, 15 USCMA 591, 36 CMR 89 (1965)], the staff judge advocate's Advice must fairly summarize all of the evidence and issues, including that favorable to the accused. United States v. Edwards, 23 USCMA 202, 48 CMR 954 (1974). Otherwise the convening authority's discretionary judgment may be prejudiced by the staff judge advocate's misleading advice. Thus, where a staff judge advocate speculated that the credibility of two defense witnesses could be discounted because they were motivated by racial identification with the accused, the Court of Military Appeals required that a new post-trial advice be prepared, and that it be reviewed by a successor convening authority who had not been exposed to the speculative assertions contained in the first advice. United States v. Silas, 23 USCMA 371, 50 CMR 5 (1975).

reference to entrapment. The Court of Military Appeals held that the convening authority must be presumed to have approved the verdict without first satisfying himself that the entrapment defense should not prevail. Accordingly, a new post-trial advice and convening authority action were ordered.

Just as Burston was entitled to have the convening authority consider his claim of entrapment, Curci was entitled to have the convening authority consider his claim of duress. The failure of the convening authority to do so (through no fault of his own) establishes that to Curci's prejudice, full and fair consideration of his claims was not obtained at every step in the military proceedings. Cf. United States ex rel. Sledjeski v. Commanding Officer, 478 F.2d 1147, 1150 (2d Cir. 1973) (mandamus lies where reviewing officer was misled).

Prior to Burns v. Wilson, 346 U.S. 137 (1953), collateral civilian review of court-martial convictions was limited to traditional jurisdictional questions. Smith v. Whitney, 116 U.S. 167, 177 (1886). In Burns, although unable to muster a majority opinion, at least seven justices subscribed to the view that a civilian court is free to re-examine the proceedings if "a military decision has not dealt fully and fairly with an allegation" of constitutional error. 346 U.S. at 142-44. Burns was denied relief upon the plurality view that the military had given full and fair consideration at every stage of the proceedings to the accused's assertions that confessions had been coerced.¹⁶

Previously, in Whelchel v. McDonald, 340 U.S. 122 (1950),

16. Justice Jackson concurred without opinion, and Justice Minton concurred on the grounds that constitutional error was not jurisdictional. 346 U.S. at 147.

it was asserted that a court-martial had wrongly resolved a sanity defense. The Supreme Court held that the proper inquiry on habeas corpus was not whether the district court would have found the accused insane; rather, the district court was initially limited to ascertaining that a claim of insanity, having been raised by the accused, was in fact duly resolved by the military. If no such resolution could be ascertained, the district court then had a duty to consider the matter de novo. See also Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965). In Gibbs, it was observed that the Articles of War did not require appointment of competent counsel. The prisoner asserted that counsel was not competent, and the Army had not clearly entertained that assertion (although counsel protested his incompetence at trial). Under such circumstances, it was held that the district court must conduct an evidentiary hearing and make a de novo determination of Gibbs' constitutional claim.

Burns and Whelchel mandate that a civilian reviewing court entertain those constitutional claims that the military failed to consider fully and fairly. Curci's assertions of incompetent counsel and of failure to consider the duress defense are of constitutional magnitude. Both the Due Process clause and the Assistance of Counsel clause are implicated in Curci's first contention. The Due Process clause necessarily reaches the duress question, inasmuch as Whelchel extends it to the sanity defense. Legally, the two defenses are of identical import.

Although the district court did determine de novo the merits of Curci's effective assistance claim, its treatment of the duress

claim stopped just short of the mark. It recognized that duress was clearly placed in issue. It all but conceded that there was "merit in the reasons for Curci's conduct," (App. 22a) which was spawned by a "Hobson's choice." App. 21a. But the district court failed to discharge its additional duty, under Burns and Whelchel, of ascertaining whether the military had fully and fairly considered Curci's affirmative defense.

The military record leaves no room for quibble; full and fair consideration was never had. In consequence, the district court was obliged to take the final step, and acknowledge that because Curci's unauthorized absence was legally justified, his court-martial conviction had to be vacated.

POINT TWO

The district court, when exercising its mandamus jurisdiction, must ascertain whether the Article 69 appeal was processed in conformity with military law.

The high office of mandamus serves to protect aggrieved citizens from governmental conduct that transgresses the legitimate bounds of authority. At bottom, every petition for mandamus seeks to secure the equal protection of the laws. The mandamus inquiry goes to whether the challenged official conduct complies with all legal requirements. Appellant sought mandamus to compel the Judge Advocate General properly to process an Article 69 appeal. Cf. Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970) (mandamus to compel processing of discharge application in conformity with controlling Army regulation).

The law affords Curci an appeal as of right under Article 69. This appeal is governed by four statutory criteria: jurisdictional error, fraud on the court, newly discovered evidence, and error to the substantial prejudice of the accused. 10 U.S.C. § 869. The last of these criteria is identical to the standard that prevails in every direct criminal appeal, civilian or military. It does not contemplate discretionary action; it contemplates traditional review for error.

The military has been rather hostile to the values which prompted Congress to enact Article 69. Regulatory materials which purport to implement that section mischaracterize it as a collateral remedy. See authorities collected at App. 18a-19a. The pattern and practice of the military, exemplified in this case, has been to make short shrift of Article 69 appeals. App. 70a.

The Court of Military Appeals recently took notice of this. In a case over which it could have no jurisdiction in the ordinary course of events, it invoked its extraordinary powers under the All Writs Act (28 U.S.C. § 1651(a)) to mandamus a grant of Article 69 relief. McPhail v. United States, 24 USCMA 304, 52 CMR 15 (1976). In McPhail, the Judge Advocate General had denied relief despite the obvious authority of a Court of Military Appeals precedent. McPhail held that mandamus lies "to require compliance with applicable law from all courts and persons purporting to act under [the U.C.M.J.'s] authority." 24 USCMA at 310, 52 CMR at 21. The Judge Advocate General was without license to ignore clear precedents which happened to displease him.

Under established military law, Curci's defense was prejudicially inadequate. It was inadequate because of the improvident stipulation that followed rejection of the government's sole proof; it was inadequate for admitting guilt instead of arguing a substantial claim of innocence. To hold otherwise is to ignore United States v. Gardner, 9 USCMA 48, 25 CMR 310 (1958), and United States v. Aikens, 27 CMR 543 (B.R. 1958), because they happen to displease.

In Gardner, the accused was represented at trial by an assigned non-lawyer.¹⁷ Gardner entered provident guilty pleas

17. Prior to the Military Justice Act of 1968, non-lawyers could appear at special courts-martial conducted under the U.C.M.J. The maximum sentence that a special court-martial can award is six months confinement, reduction in rank, partial forfeitures, and a bad conduct discharge.

to all charges except one. On the disputed charge, the prosecution's proof consisted solely of a pretrial statement attributed to the accused. Not content to rest upon the possible inadmissibility of that statement, or its failure to prove corpus delec , counsel called forth inculpatory testimony from the accused and his wife. The court-martial, not surprisingly, convicted. The Court of Military Appeals held that Gardner had been denied effective assistance of counsel on the disputed charge, and remanded for further proceedings.

Curci's claim of ineffective assistance is *à fortiori* to er. Curci received the benefit of an evidentiary ruling that demolished the prosecution's case; Gardner did not. Curci offered a complete legal justification for his conduct; Gardner did not.¹⁸ Gardner was denied the effective assistance of counsel on his lesser showing; Curci is entitled to no lesser measure of relief on his much greater showing. To hold otherwise is to permit the Judge Advocate General to arbitrarily and capriciously deny Curci the equal protection of the law, in contravention of the due process clause.

In Aikens, supra, the accused was arrested more than six years after he had gone AWOL. He was convicted of desertion

18. The district court failed to appreciate the significance of the duress defense when it opined that "through all his several pleas, Curci has never denied his guilt. Rather, he has sought to rely on collateral matters in mustering an argument for relief." App.22a. To the contrary, the duress defense that springs from Curci's undisputed testimony is wholly inconsistent with guilt. And the invalidity of Curci's induction goes to the very jurisdiction of the court-martial. See note 5 and surrounding text, supra.

by an Army general court-martial at Fort Dix. However, the morning report upon which the prosecution sought to prove inception of the offense was prepared by a unit other than the one specified in the pleadings. The Army Board of Review had no doubts as to Aikens' guilt in fact; it was "clear . . . that he departed Camp Kilmer, New Jersey, on 28 January 1952 with orders to report to his organization . . .; that he did not report as directed, was subsequently carried absent without leave, as of 1 February 1952 by [a different organization at the same base], and was apprehended in New York City on or about 19 May 1958." Id. at 595. But it was equally clear that the prosecution failed to prove these facts with competent evidence, because the inception morning report was irregular. Aikens' conviction was therefore vacated, and the charge was dismissed.

As in Aikens, the inception morning report at Curci's trial was irregular. Indeed, unlike the Aikens situation, Curci's court-martial immediately recognized the inadequacy of the proof. Is Curci entitled to any less relief than was Aikens, because Curci had the misfortune to have a counsel who naively stipulated to the crucial facts that the prosecution could not prove?

The court below made no effort to measure the Judge Advocate General's performance against the principles that control Article 69 reviews. Nowhere does the district court's opinion address the military standard for effective assistance of counsel -- a standard which is remarkably different from Wight-Rickenbacker. See, e.g., United States v. Evans, 18 USCMA 3, 4, 39 CMR 3, 4 (1968) ("defense counsel did not fully understand

that he is not an amicus for the court-martial, but an advocate for the accused"); United States v. Blunk, 17 USCMA 158, 160, 37 CMR 422, 424 (1967) ("This Court has consistently demanded 'the highest degree of professional competency . . . of an appointed defense counsel.'"); United States v. Horne, 9 USCMA 601, 26 CMR 381 (1958) (counsel's general inactivity, and in particular his failure to raise an entrapment defense, constituted ineffective assistance under the 'farce, mockery of justice' standard).

Instead, the court below held in essence that the Judge Advocate General correctly applied the Wight-Rickenbacker standard. See App. 20a. But that was not the standard which binds the Judge Advocate General. The Judge Advocate General is governed by the Uniform Code of Military Justice, as interpreted by the Court of Military Appeals. McPhail, supra.

At bottom, the district court chose to apply the wrong law. Undoubtedly, the law of this Circuit must control the disposition of Curci's collateral attack on his conviction, as pressed in Count Two of the complaint. But the law of the military must govern the conduct of the Judge Advocate General, which was attacked in Count One of the complaint. McPhail, supra. Had the district court correctly chosen the law to apply in mandamus, appellant surely would have prevailed below. By applying the wrong law, the district court reached the wrong result and denied appellant the equal protection of the laws.

CONCLUSION

Because the court-martial of Alfred A. Curci was constitutionally deficient, and his Article 69 appeal was arbitrarily and capriciously denied the consideration required by the law, the district court erred in summarily dismissing the complaint. Accordingly, appellant respectfully requests that his military conviction be voided, or in the alternative that the Judge Advocate General be compelled to reprocess Curci's Article 69 appeal in conformity with the standard announced in McPhail.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
ALFRED A. CURCI,

Appellant,

- against -

No. 77-6147

THE UNITED STATES OF AMERICA,
THE JUDGE ADVOCATE GENERAL OF
THE ARMY, and THE SECRETARY OF
THE ARMY,

Appellees.
----- x

AFFIDAVIT OF SERVICE

State of New York)
County of) ss.:

I, *Thomas W.R. Atlow*, hereby certify that on the
9th day of November, 1977, I served **two copies of the within**
Brief and Appendix for Appellant, upon Diane Eisner, Esq.,
Office of the United States Attorney, 225 Cadman Plaza East,
Brooklyn, New York, by personally delivering same.

Thomas W.R. Atlow

Sworn to before me this

9th day of November, 1977.

William E. Hafer
Notary Public

WILLIAM E. HAVER
Notary Public State of New York
No. 4652895
Qualified in New York County
Commission Expires March 30, 1979